IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL NO.1143 OF 1997
IN
WRIT PETITION NO.515 OF 1997

Brihanmumbai Mahanagar Palika, a body corporate constituted under the Mumbai Municipal Corporation Act, 1888 having its office at Mahapalika Marg, Fort, Mumbai - 400 001, through the General Manager, B.E.S.T. Undertaking, having its office at BEST Bhavan, BEST Marg, Mumbai - 400 001. .. Appellants (Org.Petitioners)

Vs.

1. T.P.Choudhary, C/o.BEST Workers' Union, 42, Kennedy Bridge, Mumbai - 400 004.

2. Shri M.N.Kulkarni, Presiding Officer, 4th Labour Court, Mumbai, having his Court and Office at Arun Chambers, Tardeo, Mumbai - 400 034.

3. Shri V.L.Kamble, Member, Industrial Court, having his Court and Office at Arun Chambers, Tardeo, Mumbai - 400 034. .. Respondents (Org.Respondents)

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S/Shri S.K.Talsania with J.S.Saluja i/b M.V.Kini & Co. for the Appellants.

Shri Vinod N. Tayade for the Respondent No.1.

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CORAM : R.M.S.KHANDEPARKAR &
DR.D.Y.CHANDRACHUD, JJ

DATED : 24TH JANUARY, 2007

ORAL JUDGMENT: (Per DR.D.Y.CHANDRACHUD, J)

1. The first respondent was working as a Conductor in the BEST Undertaking. A charge sheet was issued to the workman on 17th January, 1995 by which the disciplinary process was initiated on the ground that he was absent without leave for a period of 16 days between September, 1993 and August, 1994. A disciplinary inquiry was convened. The Enquiry Officer came to the conclusion that the charge of misconduct was duly proved. The Enquiry Officer was of the view that of the 16 days of absence, absence to the extent of 3 days was explained in view of the ESI certificate which was produced. However, for the balance of the absence, it was found that the workman had neither submitted any medical certificate nor had he taken any treatment from the dispensary of the Undertaking. The past service record was also duly considered. The service record shows that on four previous occasions, the workman had been punished on account of habitual absenteeism. Following the disciplinary proceedings, the workman was dismissed

from service on 25th February, 1995. Two internal appeals were also dismissed.

2. The workman then moved the Labour Court in proceedings under the Bombay Industrial Relations Act, 1946. By its order dated 6th September, 1996, the Labour Court held that the inquiry was fair and proper and that the findings of the Enquiry Officer were not perverse. The Labour Court was however of the view that the punishment of dismissal that was imposed was "somewhat" disproportionate. Accordingly, the Labour Court granted reinstatement but without any back wages and directed that two increments of the workman should be stopped as and by way of punishment.

3. Appeals were filed before the Industrial Court by both, the workman and the Undertaking. On 10th December, 1996, the Industrial Court allowed the appeal preferred by the workman and came to the conclusion that the charge of misconduct was not proved. The appeal filed by the Undertaking was dismissed. The Undertaking was directed to reinstate the workman with full back wages and continuity of service.

4. The BEST Undertaking thereupon preferred a

writ petition under Article 226 of the Constitution which came to be summarily dismissed by an order dated 13th August, 1997 passed by the learned Single Judge. The learned Single Judge affirmed the finding of the Industrial Court and held that the charge of habitual absence was not established. The Undertaking has challenged the judgment of the learned Single Judge in appeal.

5. On behalf of the appellants, two submissions have been urged. Firstly, it has been submitted that the Labour Court was justified in sustaining the finding of the Enquiry Officer that the charge of misconduct was proved in the disciplinary proceedings. It was submitted that the order of the Industrial Court suffers from an error apparent and the entire basis on which the Industrial Court came to a conclusion that the charge was not proved is contrary to the settled principles of law. Secondly, it was submitted that insofar as the back wages are concerned, in any event, the Industrial Court erred in granting full back wages, since it is a settled position in law that an order of back wages ought not to follow automatically even where termination is set aside or an order of reinstatement is granted.

6. Contrariwise, on behalf of the workman, learned counsel submitted that the learned Single Judge was correct in holding that the charge of habitual absence has not been established. Consequently, it was urged that the order of the Industrial Court in Appeal does not warrant interference.

7. The charge of misconduct against the workman was based on Standing Order 20 F of the Certified Standing Orders which is to the following effect.

> "Habitual absence without leave or absence without leave for more than 15 consecutive days or over staying sanctioned leave without sufficient grounds or proper or satisfactory explanation."

The standing order can for the purpose of interpretation be divided in three segments. The first part speaks of habitual absence without leave. The second part of the standing order refers to absence without leave for more than 15 consecutive days. The third part refers to an employee over staying sanctioned leave without sufficient ground or a proper or satisfactory explanation. It is with the

first part, viz. habitual absence without leave, that the charge of misconduct in the present case was concerned. The expression "habitual absence without leave" has not been conditioned, as in the second part, by a requirement that the absence should be for a particular number of days in order to constitute habitual absence. What is habitual absence would depend upon the facts of each case. Habitual absence signifies a repetitive or persistent case of absence as distinct from a stray or isolated absence. A person is said to be habituated to a particular course of conduct when such conduct is repeated with a sufficient degree of regularity as to lead to an inference that it forms a habit.

8. The question in the present case is as to whether the finding of the Industrial Court is justified and proper having regard to the admitted facts on record. The Enquiry Officer had, in the present case, found that out of 16 days during which the workman remained absent between September, 1993 and August, 1994, he had an explanation for three days of absence for which an ESI certificate was submitted. The Labour Court found that the ingredients of Standing Order 20-F were duly fulfilled. Even upon the exclusion of three days of absence, the workman

had no explanation whatsoever for absenting himself from work for a period of 10 days during the period in question. The Industrial Court interfered with the finding of the Labour Court on the ground that out of the remaining 13 days of absence, 7 days should not be calculated as absence from duty. This inference was drawn only on the basis that certain days had been "circled by the Inspector". The finding of the Industrial Court proceeded on the basis of complete conjecture and was not based on any evidence at all. The mere fact that certain days of absence have been "circled by the Inspector" cannot lead to an inference that the Inspector had treated the employee as not absent from work. There is absolutely no evidence to that effect. The second part of the order of the Industrial Court is that the BEST Undertaking had not brought on record any information or explanation from a medical authority on the question as to whether the workman had attended the dispensary for a medical check up on certain days. In holding thus, the Industrial Court has erroneously cast the onus on the employer to establish whether the absence of the employee was occasioned by a medical reason. The position in law, on the other hand, is to the effect that it is for the workman, if he so claims, to establish that he was prevented from reporting for

work for a justifiable medical reason. The workman has to prove such a defence by leading cogent evidence to that effect. The workman had not established any such defence in the disciplinary proceedings. The submission urged on behalf of the Undertaking that the finding of the Industrial Court was based on no evidence at all and the Court erred in shifting the burden on the Undertaking, has to be accepted.

9. The learned Single Judge was of the view that the expression "habitual absence" denotes a deliberate mental attitude of an employee in remaining absent without leave. In a disciplinary proceeding, in our view, it is incorrect to cast the onus upon the employer to establish the mental attitude of the employee when he remains absent without leave. Undoubtedly, habitual absence denotes something more than absence from work and the expression "habitual" is suggestive of the fact that the absence has to be of a nature that would be more significant than a stray or isolated absence. At the same time, an inference of habitual absence has to be drawn on the basis of objective facts as they emerge from the record of the disciplinary enquiry. The learned Single Judge was not justified in seeking to cast the onus upon the employer to establish the mental

attitude of the workman for remaining absent from work without leave.

10. The Industrial Court proceeded purely on the basis of conjecture in holding that for a certain part of the period of absence, the Inspector had not treated the workman in the present case to be absent from the duty. There is absolutely no evidence to that effect. Moreover, in the event that the workman sought to establish that he was compelled by a medical reason to remain absent from work, it was for him to establish the defence by leading cogent evidence which was manifestly lacking in the present case.

11. In the circumstances, the finding of the Industrial Court that the misconduct has not been proved is manifestly contrary to law and contrary to the weight of the evidence on record. In the exercise of our appellate jurisdiction against the judgment of the learned Single Judge on a petition under Article 226 of the Constitution, we are of the view that the interference of the Court is warranted to correct a manifest error of law and to prevent a miscarriage of justice.

12. Insofar as the question of punishment is

concerned, learned counsel appearing on behalf of the Undertaking has fairly drawn the attention of the Court to the fact that when the appeal was admitted, a stay was granted only to the operation of the order of back wages on 14th January, 1998. As a consequence, the workman has been reinstated and continued to be in service. The submission of the Learned Counsel for the Undertaking before the Court has, in the circumstances, been confined to the order of the Industrial Court insofar as it grants full back wages. In view of the judgment of the Supreme Court in **U.P.State Brassware Corporation Ltd. & Anr. v. Uday Narain Pandey,** reported in (2006)1 SCC 479, it is now a settled position that while no precise formula could be laid down with regard to the grant of back wages, an order for payment of full back wages should not automatically or mechanically follow where the termination has been set aside. In the present case, the Labour Court was of the view that the imposition of punishment of dismissal was somewhat disproportionate. As we have already noted, the order of reinstatement does not fall for interference at this stage, nor has such a submission fairly been urged before us. Having regard to the circumstance that the charge of misconduct has been held to be proved, an order for payment of full back wages is

clearly not warranted. In our view, the ends of justice would be met if the quantum of back wages is restricted to 25%. For computing the payment of back wages, the relevant period shall be from the date of dismissal from the service (25th February, 1995) until the date on which the workman was reinstated in service. The Appeal is accordingly allowed. The orders of the learned Single Judge and of the Industrial Court are set aside and shall stand substituted with the directions which have been issued hereinabove.

13. There shall be, in the facts and circumstances of the case, no order as to costs.

(R.M.S.KHANDEPARKAR, J)

(DR.D.Y.CHANDRACHUD, J)